U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

Issue Date: 08 July 2005

Case No.: 2004-BLA-5484

In the Matter of:

NEEDHAM F. WHITFIELD,
Claimant

v.

SEXTET MINING CORPORATION,
Employer

SECURITY INSURANCE COMPANY OF HARTFORD,
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

APPEARANCES:[1]

Ms. Frances Poole, Lay Representative
For the Claimant

Allison B. Rust, Esq.
For the Employer

BEFORE: Robert L. Hillyard
Administrative Law Judge

DECISION AND ORDER - DENIAL OF BENEFITS

This proceeding arises from a claim filed by Needham F. Whitfield for benefits under the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901, *et seq.*, as amended ("Act"). In accordance with the Act, and the regulations issued thereunder, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs, for a formal hearing.

[1] The Director, OWCP, was not represented at the hearing.

Benefits under the Act are awarded to persons who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of persons who were totally disabled at the time of their death or whose death was caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising out of coal mine employment, and is commonly known as black lung.

A formal hearing in this case was held in Madisonville, Kentucky, on January 26, 2005. Each of the parties was afforded full opportunity to present evidence and argument at the hearing as provided in the Act and the regulations issued thereunder, which are found in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.

The findings and conclusions that follow are based upon my observation of the appearance and the demeanor of the witness who testified at the hearing, and upon a careful analysis of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent case law.

I. Statement of the Case

The Claimant, Needham F. Whitfield, filed a claim for black lung benefits pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, on September 10, 2001 (DX 3).[2] A Notice of Claim was issued on November 14, 2001, identifying Sextet Mining Corporation, as the responsible operator (DX 17). On December 17, 2001, the Employer filed its Response to Notice of Claim and its Controversion (DX 19). The District Director, OWCP, denied benefits on September 13, 2003 (DX 22). The Claimant requested a formal hearing and the claim was referred to the Office of Administrative Law Judges on December 19, 2003 (DX 26).

A hearing was held in Madisonville, Kentucky, on January 26, 2005, before the undersigned Administrative Law Judge. The record was held open for 30 days for filing of briefs (Tr. 34).

The Claimant filed previous claims in 1992 (DX 1) and 1998 (DX 2). The 1998 claim was denied on September 24, 1998. The

[2] In this Decision, "DX" refers to the Director's Exhibits, "CX" refers to the Claimant's Exhibits, "EX" refers to the Employer's Exhibits, and "Tr." refers to the transcript of the formal hearing.

Miner established pneumoconiosis arising out of coal mine employment but failed to establish total disability due to pneumoconiosis (DX 2).

Evidentiary Issues

At the hearing, the Employer objected to Claimant's Exhibits Nos. 5, 6, and 7, stating that they do not meet the quality guidelines under § 718.104 (Tr. 9-10). The Exhibits were admitted over objection, and consideration of the quality standards for those Exhibits will be considered in the probative weight assigned to each Exhibit.

II. Issues[3]

The issues as listed on Form CM-1025 are:

1. Whether the claim was timely filed;

2. Whether the Miner has pneumoconiosis as defined by the Act and the regulations;

3. Whether the Miner's pneumoconiosis arose out of coal mine employment;

4. Whether the Miner is totally disabled;

5. Whether the Miner's disability is due to pneumoconiosis; and,

6. Whether the Miner established a material change in conditions under § 725.309(d).

III. Findings of Fact and Conclusions of Law

The Claimant, Needham F. Whitfield, was born on August 8, 1929 (EX 2 at 4). He completed the sixth grade (EX 2 at 5). The Claimant has one dependent for purposes of augmentation of benefits; namely, his wife, Margaret, whom he married on June 25, 1949 (DX 2; Tr. 18).

The Claimant testified that he smoked from approximately 1945 to 1992 at a rate of about one pack per day (Tr. 26; EX 2

[3] At the hearing, the Employer withdrew the issues of miner, post-1969 employment, dependency, and responsible operator. The parties stipulated to 22 years of coal mine employment (Tr. 16-17).

at 15-16). Dr. Chavda's report supports the testimony given (DX 7), but the treatment notes (DX 9) do not support the smoking history reported. The treatment notes consistently document a smoking history from 1945-1992 at a rate of 2.5-3 packs per day. The record consistently lists smoking from 1945-1992, or 47 years. I find the treatment notes persuasive, however, and I find that the Claimant smoked at a rate of 2.5-3 packs per day.

Timeliness

Section 725.308(c) creates a rebuttable presumption that every claim for benefits is timely filed. The Employer has submitted no evidence to rebut the presumption and the record contains no evidence that the Claimant received the requisite notice more than three years prior to filing his claim for benefits. Therefore, I find that this claim was timely filed.

Coal Mine Employment

Section 725.101(a)(32)(ii) directs an adjudication officer to determine the beginning and ending dates of coal mine employment by using any credible evidence.

On his application, the Claimant stated that he worked in coal mine employment for 25-30 years (DX 3). At the hearing, the parties stipulated to 22 years of coal mine employment (Tr. 16-17).

The Claimant's Employment History form lists coal mine employment from 1944 to 1991 (DX 3). The Claimant's FICA Earnings worksheet shows employment from 1969-1991 (DX 2). I find that the stipulation is supported by the record and find that the Claimant has established 22 years of coal mine employment.

The Claimant's last employment was in the Commonwealth of Kentucky; therefore, the law of the Sixth Circuit is controlling.

Responsible Operator

Sextet Mining Corporation has withdrawn its challenge to the issue of responsible operator, and I find that Sextet Mining Corporation is properly named as the responsible operator under §§ 725.494, 725.495 (Tr. 16).

IV. Medical Evidence

X-ray Studies

	Date	Exhibit	Doctor	Reading	Standard
1.	06/10/04	EX 1	Selby B reader[4]	Negative	Good
2.	12/29/04	CX 2	Baker B reader	1/0, p/s	Good
3.	10/03/02	CX 1	Brandon B reader Board cert.[5]	2/1 q/t	Fair
4.	10/02/01	DX 7	Chavda	1/1 u/u	Good

Pulmonary Function Studies

	Date	Exh.	Doctor	Age/ Hgt.[6]	FEV_1	MVV	FVC	FEV_1/ FVC	Standards
1	06/10/04	EX 1	Selby	74/67"	1.65	--	3.06	54%	Tracings included/ Good coop./ comp.
			Post-Bronch.		1.91	--	3.67	52%	
		Note: MVV not performed.							
2	11/15/04	CX 6	Simpao	75/69"	1.62	--	3.41	47%	Tracings included/ Good coop./ comp.
		Note: MVV not performed.							
3	10/03/02	CX 3	Simpao	73/69"	1.81	59	3.50	52%	Tracings included/ Good coop./ comp.
			Post-Bronch.		1.76	59	3.74	46%	

[4] A "B reader" is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successfully completing an examination conducted by or on behalf of the Department of Health and Human Services. *See* 42 C.F.R. § 37.51(b)(2).

[5] A Board-certified Radiologist is a physician who is certified in Radiology or Diagnostic Roentgenology by the American Board of Radiology or the American Osteopathic Association. *See* § 718.202(a)(ii)(C).

[6] The fact finder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). I find the Miner's height to be 69".

4	10/02/01	DX 15	Chavda	72/68"	1.78	52	3.41	52%	Tracings included/ Good coop./ comp.
			Post-	Bronch.	1.71	--	3.79	45%	

Note: Dr. Chavda stated that the "mild reduction in FEV + FVC post bronchodilator has no clinical significance. This could be due to reduced patient effort during the test."

Arterial Blood Gas Studies

	Date	Exhibit	Physician	pCO_2	pO_2
1.	06/10/04	EX 1	Selby	37	73
			Exercise	32	60
2.	11/15/04	CX 6	Simpao	37.8	80.1
3.	10/02/01	DX 7	Chavda	38.0	81.0

Narrative Medical Evidence

1. Dr. Jeff W. Selby, a Board-certified Internist, Pulmonologist, Critical Care Specialist, and B reader, examined the Claimant on June 10, 2004 (EX 1). Based on symptomatology (shortness of breath, sputum), employment history (22 years coal mine employment), individual and family histories (prior cataract surgery), smoking history (30 years, 1 ppd), physical examination (chest normal, slight decrease in breath sounds, no rales wheezes, or rhonchi), chest x-ray (negative), CT scan (negative), pulmonary function study (moderate obstruction, significant improvement w/ bronchodilation), arterial blood gas study (mild to moderate hypoxia), and an EKG (normal), Dr. Selby opined that the Miner does not suffer from coal workers' pneumoconiosis or any pulmonary condition related to coal dust exposure. He stated that the Miner's 30 pack year smoking history has caused a moderate degree of lung obstruction in the form of chronic bronchitis and emphysema. He based his findings on physical examination showing decrease in breath sounds, arterial blood gases showing hypoxia, pulmonary function testing showing obstruction with substantial improvement after bronchodilators, and on a negative CT scan and an x-ray for pneumoconiosis. He opined that the Miner's elevated carboxyhemoglobin reading suggested that some cigarette smoking was ongoing. While Dr. Selby opined that the Miner retained the pulmonary capacity to perform his last job when he quit in 1991, he did not make a determination of the Miner's current pulmonary capacity or whether the Miner is currently totally disabled.

2. Dr. Don E. Pruitt, who lists no radiographic credentials, interpreted a June 10, 2004, CT scan and diagnosed generalized chronic lung disease (EX 1). He opined that a "determination of black lung disease cannot be made from this examination."

3. Dr. John J. Farmer, who lists no medical specialty credentials, examined the Claimant on July 15, 2004 (CX 7). Dr. Farmer is the Miner's treating physician. Based on symptomatology (congestion, shortness of breath), individual and family histories ("history of emphysema and black lung disease"), and physical examination (lungs diminished and tachypneic with wheeze and diminished breath sounds), Dr. Farmer diagnosed chronic obstructive pulmonary disease exacerbation. He did not list the basis of his opinion and he did not make a total disability finding.

4. Dr. Valentino Simpao, who lists no medical specialty credentials, submitted a one-page evaluation of the Miner dated December 28, 2004 (CX 6). He stated that he has treated the Miner since 1994, and he opined that the Miner has an occupational lung disease caused by coal mine employment. He diagnosed both clinical and legal pneumoconiosis based on "multiple years of coal dust exposure." He opined that the Miner suffers from a severe impairment and that he no longer has the respiratory capacity to perform the work of a coal miner. He stated that he based his disability finding on pulmonary function testing, chest x-ray, arterial blood gas testing, physical findings on examination, and symptoms. He did not list the specific objective testing (dates of testing, particular readings, etc.) relied on.[7]

5. Dr. Sanjay Chavda, who lists no pulmonary credentials, examined the Claimant on October 2, 2001 (DX 7). Based on symptomatology (sputum, cough), employment history (22 years coal mine employment), individual and family histories (cataract surgery, chronic bronchitis), smoking history (47 years, 1 ppd, quit 1992), physical examination (good air entry, no wheezing), chest x-ray (1/1), pulmonary function study (moderate obstructive airways disease), arterial blood gas study (normal), and an EKG (normal), Dr. Chavda diagnosed obstructive airways disease. He listed the etiology of this condition as exposure to coal dust and smoking. He opined that the Miner suffers from

[7] The record contains a November 15, 2004, pulmonary function test and arterial blood gas test (CX 6). Dr. Simpao does not state whether he relied on these tests, which were performed nearly 45 days before his December 28, 2004, written report. The record does not contain an x-ray interpretation or a physical examination report from Dr. Simpao.

a moderate impairment, but he did not make a determination as to disability.

Treatment Notes

The record contains treatment notes dated March 31, 1999, through January 17, 2002, from the Coal Miner's Respiratory Clinic in Greenville, Kentucky (DX 9). The treatment notes document occasional symptoms of sputum and wheezes, diminished breath sounds, and a past history of "lung disease." A smoking history of 52 years at a rate of 2½ packs per day is listed on the August 31, 2001, History and Assessment. A 52-year smoking history at 3 packs per day is listed on the Miner's June 14, 2000, and his March 31, 1999, Assessments. Dr. Simpao diagnoses coal workers' pneumoconiosis in treatment notes dated August 31, 2001. In an annual physical examination conducted on June 20, 2000, Dr. Simpao noted that the Miner's FEV_1 readings improved slightly from the previous year.

V. Discussion and Applicable Law

The Claimant filed his black lung benefits claim on September 10, 2001 (DX 3). Because this claim was filed after March 31, 1980, the effective date of Part 718, it must be adjudicated under those regulations.[8]

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. § 718, a claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§ 718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 B.L.R. 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 B.L.R. 1-26 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 B.L.R. 1-1 (1986) (*en banc*).

Subsequent Claim

The amended regulations contain a threshold standard that the Claimant must meet before a duplicate claim may be reviewed *de novo*.

[8] Amendments to the Part 718 regulations became effective on January 19, 2001. Section 718.2 provides that the provisions of § 718 shall, to the extent appropriate, be construed together in the adjudication of all claims.

> A subsequent claim … shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement ... has changed since the date upon which the order denying the prior claim became final…. For example, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this sub-chapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.

Section 725.309(c)-(d).

In *Grundy Mining Co. v. Director, OWCP [Flynn]*, 353 F.3d 467 (6th Cir. 2003), a multiple claim arising under the pre-amendment regulations at 20 C.F.R. § 725.309 (2000), the Court reiterated that its previous decision in *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994) requires that the ALJ resolve two specific issues prior to finding a "material change" in a miner's condition: (1) whether the miner has presented evidence generated since the prior denial establishing an element of entitlement previously adjudicated against him; and, (2) whether the newly submitted evidence differs "qualitatively" from evidence previously submitted. Specifically, the *Flynn* Court held that "miners whose claims are governed by this Circuit's precedents must do more than satisfy the strict terms of the one-element test, but must also demonstrate that this change rests upon a qualitatively different evidentiary record." *See also, Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 608-610 (6th Cir. 2001). Once a "material change" is found, then the ALJ must review the entire record *de novo* to determine ultimate entitlement to benefits.

The Claimant's 1998 claim was denied because the Claimant did not establish total disability due to pneumoconiosis (DX 2). To obtain the right to a *de novo* review of his subsequent claim, therefore, the Claimant must first establish total disability or his claim must be denied without further review pursuant to § 725.309(c)-(d).

Pneumoconiosis

Section 718.202 provides four means by which pneumoconiosis may be established. Under § 718.202(a)(1), a finding of pneumoconiosis may be based on x-ray evidence. The record contains four interpretations of four different chest x-rays.

The record contains three positive readings and one negative reading. Noting the majority of positive readings, I

give greatest weight to the positive reading by Dr. Brandon, the most highly qualified physician, and I find that the existence of pneumoconiosis is again established pursuant to 20 C.F.R. § 718.202(a)(1).

Section 718.202(a)(2) is inapplicable because there are no biopsy or autopsy results. Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of the several presumptions is found to be applicable. In the instant case, § 718.304 does not apply because there is no x-ray, biopsy, autopsy, or other evidence of large opacities or massive lesions in the lungs. Section 718.305 is not applicable to claims filed after January 1, 1982. Section 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982.

Under § 718.202(a)(4), a determination of the existence of pneumoconiosis may be made if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in § 718.201. Pneumoconiosis is defined in § 718.201 as a chronic dust disease of the lung, including respiratory or pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical" pneumoconiosis and statutory, or "legal" pneumoconiosis. Section 718.201(a).

For a physician's opinion to be accorded probative value, it must be well reasoned and based upon objective medical evidence. An opinion is reasoned when it contains underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts, and other data on which the diagnosis is based. *Id.* A brief and conclusory medical report that lacks supporting evidence may be discredited. *Lucostic v. United States Steel Corp.*, 8 B.L.R. 1-46 (1985); *see also, Mosely v. Peabody Coal Co.*, 769 F.2d 357 (6th Cir. 1985). Further, a medical report may be rejected as unreasoned where the physician fails to explain how his findings support his diagnosis. *Oggero v. Director, OWCP*, 7 B.L.R. 1-860 (1985).

Dr. Selby, a Board-certified Internist, Pulmonologist, Critical Care Specialist, and B reader, opined that the Miner does not suffer from clinical or legal pneumoconiosis. He based his diagnosis on a negative CT scan and x-ray, and on physical examination findings showing decreased breath sounds, improvement on pulmonary function testing after bronchodilation, and an elevated carboxyhemoglobin test which suggested a smoking etiology to any impairment suffered by the Miner and that the Miner was still continuing to smoke at some level.

Dr. Selby's opinion is well reasoned. He based his opinion on objective testing and explained how the readings supported his diagnosis. Noting Dr. Selby's superior credentials, I give his opinion great weight.

Dr. Pruitt, who lists no radiographic credentials, read a June 10, 2004, CT scan and opined that a "determination of black lung disease cannot be made from this examination." A physician's report that is silent as to a particular issue is not probative of that issue. *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000). As Dr. Pruitt did not make a diagnosis regarding pneumoconiosis, I give his CT scan interpretation no probative weight on the issue of pneumoconiosis.

Dr. Farmer, who lists no pulmonary credentials, was the Miner's treating physician. "[T]he opinions of treating physicians are not necessarily entitled to greater weight than those of non-treating physicians in black lung litigation." *Eastover Mining Co. v. Williams*, 338 F.3d 501 (6th Cir. 2003). "[I]n black lung litigation, the opinions of treating physicians get the deference they deserve based on their power to persuade." *Id.* at 510; 20 C.F.R. § 718.104(d). "A highly qualified treating physician who has lengthy experience with a miner may deserve tremendous deference, whereas a treating physician without the right pulmonary certifications should have his opinion appropriately discounted." *Id.* In addition, appropriate weight should be given as to whether the treating physician's report is well reasoned and well documented. *See Peabody Coal Co. v. Groves*, 277 F.3d 829 (6th Cir. 2002); *McClendon v. Drummond Coal Co.*, 12 B.L.R. 2-108 (11th Cir. 1988).

Dr. Farmer diagnosed chronic obstructive pulmonary disease. He did not list the etiology of the COPD, nor did he list the basis of his diagnosis. He did not perform an x-ray, pulmonary function test, or arterial blood gas test on the Miner. He did not list the smoking or employment history of the Miner. Noting Dr. Farmer's lack of pulmonary credentials, I find his opinion to be unreasoned and undocumented and I give Dr. Farmer's opinion little weight on the issue of pneumoconiosis.

Dr. Simpao, who lists no pulmonary credentials, diagnosed clinical and legal pneumoconiosis based on "multiple years of coal dust exposure." He stated that he based his opinion on objective testing, but he did not list the specific testing relied on or the readings that supported his diagnosis. A physician's report may be rejected where the basis for the physician's opinion cannot be determined. *Cosaltar v. Mathies*

Coal Co., 6 B.L.R. 1-1182 (1984). In *Taylor v. Brown Badgett, Inc.*, 8 B.L.R. 1-405 (1985), the Board explained that the fact that a miner worked for a certain period of time in the coal mines "does not tend to establish that he does [or does] not have any respiratory disease arising out of coal mine employment." *Taylor*, 8 B.L.R. at 1-407. Noting Dr. Simpao's lack of pulmonary credentials, I find his opinion is unsupported, undocumented, and unreasoned. I give Dr. Simpao's opinion little weight on the issue of pneumoconiosis.

Dr. Chavda, who lists no pulmonary credentials, diagnosed obstructive airways disease as a result of coal dust exposure and smoking. Such a diagnosis, if reasoned, would conform to the legal definition of pneumoconiosis. He based his opinion on pulmonary function testing showing moderate obstruction and on a positive x-ray and history of coal dust exposure. A documented opinion is one that sets forth the clinical findings, observations, facts, and other data upon which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). Dr. Chavda based his opinion on objective testing and documented which testing supported his diagnosis. Noting Dr. Chavda's lack of pulmonary credentials, I give his opinion some weight.

Inaccurate Smoking Histories

It is proper for an Administrative Law Judge to discredit a medical opinion based on an inaccurate smoking history. *Trumbo v. Reading Anthracite Co.*, 17 B.L.R. 1-85 (1993). The treatment notes from the Coal Miner's Respiratory Clinic in Greenville, Kentucky, show a smoking history of approximately 47 years at a rate of 2.5-3 packs per day. Every physician of record recorded smoking histories based on a rate of one pack per day, which suggests that the actual smoking history could be double to triple the rate quoted on the medical narratives. It is also noteworthy that Dr. Selby's carboxyhemoglobin test was elevated, suggesting that the Miner was still smoking at some level even though he reported quitting in 1992.

Dr. Chavda diagnosed moderate obstructive airways disease due in part to coal dust exposure, but he did not have an accurate smoking history when making that diagnosis. Drs. Pruitt, Farmer, and Simpao did not list a smoking history, nor did they incorporate smoking as a possible cause of the Miner's ailments. An opinion which fails to adequately address all possible forms of causation is undocumented, unreasoned, and of little or no probative value. *Cannelton Industries, Inc. v. Director, OWCP [Frye]*, Case No. 03-1232 (4th Cir. Apr. 5, 2004) (unpub). Dr. Selby, a Pulmonary Specialist and B reader,

provides a well-reasoned opinion, based upon objective medical evidence, that the Claimant does not suffer from pneumoconiosis as defined in § 718.201. Even with a reduced smoking history, he opined that the Miner's moderate obstruction was due to smoking and not coal dust exposure. A heavier actual smoking history in this instance would further corroborate his findings. Noting the credentials of the physicians, the smoking histories relied on, and the reasoning in their opinions, I give the greatest weight to Dr. Selby's opinion. Accordingly, I find that the Claimant has not established the existence of pneumoconiosis through newly submitted evidence under § 718.202(a)(4).

Causal Connection between Pneumoconiosis and Coal Mine Work

The Claimant established the existence of pneumoconiosis under § 718.202(a)(1). It is presumed that the pneumoconiosis of a claimant who establishes 10 or more years of coal mine employment arose out of coal mine employment. Section 718.203(a). As the Employer in this case stipulated to coal mine employment of 22 years and has offered no evidence to rebut the presumption, I find that the Claimant's pneumoconiosis arose out of coal mine employment.

Total Disability

Total disability is defined as the miner's inability, due to a pulmonary or respiratory impairment, to perform his or her usual coalmine work or engage in comparable gainful work in the immediate area of the miner's residence. § 718.204(b)(1)(i)and (ii). The Claimant must establish by a preponderance of the evidence that his pneumoconiosis was at least a contributing cause of his total disability. *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (4th Cir. 1994); *Baumgartner v. Director, OWCP*, 9 B.L.R. 1-65, 1-66 (1986); *Gee v. Moore & Sons*, 9 B.L.R. 1-4, 1-6 (1986) (*en banc*). Total disability can be established pursuant to one of the four standards in § 718.204(b)(2) or through the irrebuttable presumption of § 718.304, which is incorporated into § 718.204(b)(1). The presumption is not invoked here because there is no x-ray evidence of large opacities and no biopsy or equivalent evidence.

Where the presumption does not apply, a miner shall be considered totally disabled if he meets the criteria set forth in § 718.204(b)(2), in the absence of contrary probative evidence. The Board has held that under § 718.204(c), the precursor to § 718.204(b)(2), all relevant probative evidence, both like and unlike, must be weighed together, regardless of the category or type, to determine whether a miner is totally

disabled. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1986); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 B.L.R. 1-231, 1-232 (1987).

Section 718.204(b)(2)(i) permits a finding of total disability when there are pulmonary function studies with FEV_1 values equal to or less than those listed in the tables and either:

1. FVC values equal to or below listed table values; or,
2. MVV values equal to or below listed table values; or,
3. A percentage of 55 or less when the FEV_1 test results are divided by the FVC test results.

The record contains four pulmonary function studies. The November 15, 2004, pulmonary function test produced qualifying values. The June 10, 2004, test produced qualifying values prebronchodilator and nonqualifying values post-bronchodilator. The October 3, 2002, test produced qualifying values post-bronchodilator and nonqualifying values pre-bronchodilator. The October 2, 2001, test produced qualifying values post-bronchodilator and nonqualifying values pre-bronchodilator. Dr. Chavda opined that the qualifying values on the October 2, 2001, test have no clinical significance and that the reduction shown after bronchodilation "could be due to reduced patient effort during the test." As Dr. Chavda was the performing physician, I give his opinion great weight and find that the qualifying values on the October 2, 2001, test are of no clinical significance.

More weight may be given to the results of a recent ventilatory study over the results of an earlier study. *Coleman v. Ramey Coal Co.*, 18 B.L.R. 1-9 (1993). The three most recent pulmonary function tests produced qualifying readings. After disqualifying Dr. Chavda's October 2, 2001, report (the oldest on record) as discussed above, I find that pulmonary function evidence supports total disability.

Total disability may be found under § 718.204(b)(2)(ii) if there are arterial blood gas studies with results equal to or less than those contained in the tables. The record contains three arterial blood gas studies. Dr. Selby's June 10, 2004, arterial blood gas test produced qualifying readings after exercise. Dr. Selby's resting reading was nonqualifying and the tests of Drs. Simpao and Chavda produced nonqualifying readings. I find that arterial blood gas evidence does not support total disability.

There is no evidence presented, nor do the parties contend that the Claimant suffers from cor pulmonale or complicated coal workers' pneumoconiosis.

Under § 718.204(b)(2)(iv) total disability may be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevented the miner from engaging in his usual coal mine work or comparable and gainful work.

Drs. Pruitt, Farmer, Selby, and Chavda did not make a diagnosis as to disability. A physician's report that is silent as to a particular issue is not probative of that issue. *Island Creek Coal Co., supra.*

Dr. Simpao opined that the Miner no longer retains the respiratory capacity to perform the work of a coal miner. He based his total disability diagnosis on a positive x-ray, pulmonary function and arterial blood gas testing, physical examination findings, and symptoms, but he did not state the dates of the testing relied on and he did not list the individual readings relied on to make his diagnosis. *See* fn 7. Noting that Dr. Simpao is not a Pulmonologist, I give his undocumented, unsupported opinion little weight.

The record contains qualifying pulmonary testing, nonqualifying blood gas testing, and no well-reasoned opinions demonstrating that the Claimant suffers from total pulmonary or respiratory disability. I find, therefore, that newly submitted evidence as a whole fails to establish total disability under § 718.204(b)(2).

The Claimant has failed to establish through newly submitted evidence any element of entitlement previously adjudicated against him. It is, therefore, unnecessary to determine whether the newly submitted evidence differs "qualitatively" from the prior evidence. *Grundy, supra*. Pursuant to § 725.309, his claim must be denied without further review as a matter of law.

VI. Entitlement

Needham F. Whitfield, the Claimant, has not established entitlement to benefits under the Act.

VII. Attorney's Fee

The award of an attorney's fee is permitted only in cases in which the claimant is entitled to benefits under the Act. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for representation services rendered in pursuit of the claim.

VIII. ORDER

It is, therefore,

ORDERED that the claim of Needham F. Whitfield for benefits under the Act is hereby DENIED.

A

Robert L. Hillyard
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C., 20013-7601. A copy of a Notice of Appeal must also be served upon Donald S. Shire, Esq., 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C., 20210.